

A
A
0
0
0
0
1
5
0
6
4
1
9



0 1 2 3 4 5 6 7 8 9 A B C D E F G H I J K L M N O P Q R S T U V W X Y Z

California
Regional
Council

Digitized by the Internet Archive
in 2007 with funding from
Microsoft Corporation

A
L E T T E R
FROM A
MEMBER of PARLIAMENT
TO
ONE OF HIS CONSTITUENTS,
ON THE
Late Proceedings of the House of Commons
in the Middlesex Elections.

WITH A
P O S T S C R I P T,
CONTAINING
Some OBSERVATIONS on a Pamphlet entitled,
“ The Case of the late Election for the County of
“ Middlesex considered.”

Thus to regulate Candidates and Electors, and new-model the Way of Election, What is it but to cut up the Government by the Roots, and poison the very Fountain of Public Security?

LOCKE on Civil Government.

L O N D O N:
Printed for M. HINGESTON, in the Strand,
near Temple-Bar.

MDCCLXIX.

By the Author John Phillips
and the Printer



JIN
1061
1769
MEM 8

A

L E T T E R, &c.

S I R,

THE constitutional Manner in which I received, and mean to hold, my Seat in Parliament, makes me think myself obliged to render an Account of my Conduct in every Public Measure, which may materially affect their Interest, to my Constituents. However fashionable it may be for those to treat lightly this Duty, who either do not, from the Manner in which they procured their Seats, feel its Force ; or are ashamed of not having in their Conduct since, submitted to its Influence ; I do not think I can be ac-

B

cused

cused of carrying the Idea too far when I say, Though I may think myself at liberty, in great national Measures, to follow my own Judgment solely, and to be influenced only by those Arguments which are brought in Parliament; yet in Questions of internal Polity, where the Interest of the particular Place I represent may be concerned, or in Questions affecting the *substantial Rights* or *Privileges* of every individual Elector or Freeman in this Kingdom, I should think myself bound to obey implicitly the Instructions of those who sent me, had they given me any: And if from a Confidence in my Zeal for, and Attention to, the Preservation of their Liberties, they have not thought it necessary to give me any particular Directions, I do not hold myself the less bound to give them an Account of the Steps I have taken towards the faithful Discharge of so honourable, so important, so unlimited a Trust.

I think myself at this Time particularly obliged to give you an Account of my Conduct in the late Proceedings of the House of Com-

Commons upon the Middlesex Elections ; not only because they are, in my Opinion, Questions which affect the *substantial Rights* and *Privileges* of every individual Elector and Freeman in this Kingdom ; but because, situated as you are at a Distance remote from the Capital, you may have been induced, by News-Paper Writings, to look upon the first Foundation of these Disputes to be the Case of a *turbulent* and *distressed* Man of *bad Character*, taken up by some *disappointed Statesmen* and *discarded Courtiers* to serve their own Purposes, by availing themselves of the Clamour of a *deluded Rabble* to *disturb* and *distress* the Councils of an *insulted Prince*. To clear myself, therefore, from the Suspicion of having countenanced Sedition, and promoted the Views of Faction, by distressing that Government which I set out with an Intention to support, as far as I could consistently with the Feelings of an honest, and the Character of an independant Man, will be the Object of this Letter.

Having had the Fortune (whether good or bad you must determine) to differ in every one of those Measures from the Majority of those Members of the House who were present, I will candidly lay before you, as far as I am able, the History of the whole Transaction, the Reasons urged why the House should take those Steps, and the Considerations that weighed with me to oppose them.

It was not till many Months after Mr. Wilkes's Election that a Motion was made for his Expulsion. The Truth is, he would probably have been suffered quietly to take his Seat, at the Expiration of his Confinement, *notwithstanding his previous Crimes*, had he not given fresh Offence to the Ministry by a Petition presented to the House, complaining of Grievances, and a libellous Preface to an official Letter of Lord Weymouth's, published in the News-Papers. I am warranted in this Assertion by the Expulsion having been so long delayed, though two of the Crimes, mentioned in the Votes as the

the Foundation of that Resolution, were notorious previous to his Election, and what he was actually suffering Imprisonment for at the Time of the Meeting of Parliament ; and the other was the very Libel I have just mentioned, which was deemed so a short Time before in the House, probably to serve in Part this Purpose. But, without entering into this Argument, or considering the Propriety of making the House of Commons the Instruments of ministerial Resentment, and a Seat in Parliament the Reward of quiet Submission to unconstitutional Persecutions ; I will state to you the Merits of the Petition, as they appeared upon the Face of the Proceedings.

It was urged, That a Man guilty, and convicted, of such Crimes was unfit to be a Representative of the People : That it was inconsistent with the Dignity of so great an Assembly as the House of Commons, to suffer such a Man to remain amongst them ; That a censorial Authority must necessarily reside somewhere, and could no where be so properly

properly situated in this Constitution, as in the House of Commons.

It was urged on the other hand, That the very Principles of our Government did not admit of two Punishments for the same Crime : That Mr. Wilkes had already been expelled for one of these Crimes : That for another he was condemned by the known Laws of the Land to suffer Imprisonment : That the third being a Libel upon one Minister only, it might be of dangerous Consequence to make a Precedent of Expulsion from that Assembly for having too freely censured the official Conduct of a single Minister ; and, above all, it was insisted upon, That a Charge of an accumulative Nature was new, and unjust, as it might so happen, that though* a Majority might acquit him upon each of those Crimes, yet accumulated Minorities might make a Majority upon the Whole to condemn.

* Vide Lords Protest in Sacheverell's Case.

As all these Arguments, and, indeed, all the others that were used, seemed to depend upon the Circumstances of this particular Case, it may not be improper for me to examine it upon more general Principles.

The House have undoubtedly a Right to expel; but it by no means follows, that they did right when they exercised it upon this Occasion. There must be a supreme uncontrollable Power in all Governments lodged somewhere; but to say that Power cannot be abused, and perverted to Purposes very different from those for which it was at first intended, would be to say, those to whom it was intrusted were more than Men; and to deny that there has been an Abuse in some Instance of every Power that has ever been delegated, would be to dispute the Evidence of all History. The first Exercise we find upon Record of the Power of Expulsion was in Queen Elizabeth's Reign. From that Time till the present it has never been employed but against Persons who have been found guilty of Crimes which the Electors, at the Time of their Choice, might not be
sup-

supposed to know *; or Members who have misbehaved in the House.

In the first Case, nothing can be more reasonable or less dangerous to the Privileges of the Electors than to send back to them a Man in whom they may have been deceived, to be assured, that, so circumstanced, he is the Man of their Choice.

The Necessity of such a Power in the House of Commons in the second Case, proceeds from two Principles; the one absolutely necessary to all well-ordered Govern-

* This is the Doctrine expressly laid down in the Case of Fitzherbert in D'Ewes's Journal. *Multa sunt quæ fieri non debent, quæ tamen facta tenentur bona.* It had been a good Exception against his Election to say he was out-lawed, but *'tis no Disability to him being elected.* Mr. Tanfield speaking, held that a Person outlawed might be a Burgess of the House, *wherein he made a Difference where Exceptions grew upon Matter before the Election, and where after.* If the Exception grew *after*, then a Burgess not to be one of the House. Upon these Reasons Mr. Fitzherbert was allowed to sit, the Outlawry being *previous* to his Election.

ments,

ments, That there should be no Crime for which there is not a Tribunal and a Punishment; the other peculiar to the Form of our Constitution, and essential to the Freedom and Existence of Parliaments, That no Man should be questioned elsewhere for what he does in Parliament.

It would be taking up your Time very unnecessarily to prove, that none of the three Crimes laid to Mr. Wilkes's Account came within this Description. The two first were notorious before his Election, he having been found guilty of them by Juries of the *very County* for which he was chosen; the third was certainly neither an Offence against Parliament, nor committed in Parliament. For these Reasons, and many others, which it would be tedious to mention, I, with many others, thought Mr. Wilkes should not have been expelled. *Dis aliter visum*: The contrary Reasoning prevailed with the Majority, and the Expulsion took Place.

Had Mr. Wilkes been chosen for any petty or venal Borough, the Contest would probably

C

bly

bly have ended here ; the distressed Circumstances of the Person concerned, the Inequality of the Contest between any Individual and a Board of Treasury determined to carry their Point, would have made the Attempt desperate, and the Defeat certain : But the Ministry had not so advantageous a Field of Battle. The Freeholders of Middlesex (whether actuated by a Spirit of stubborn Faction, or the laudable Resolution of firmly supporting every Tittle of what they thought their inherent indefeasible Rights, it is not to my present Purpose to examine) returned Mr. Wilkes with all his Imperfections on his Head. He went to them branded with a contested Expulsion ; they sent him back honoured with an unanimous Re-election. Should he be received ? The Honour, the Firmness, perhaps the Pride of Administration forbad it. It would have been in vain that they had made an odious Exertion of a Legal Power, if the End could be so easily frustrated by the Voice of the Middlesex Freeholders. Mr. Wilkes was, at all Events, to be excluded. No Price was thought too great for a Victory which was to establish their
Power,

Power, and proclaim their Triumph.——
 The Way to do it effectually was the only
 Difficulty.

And here we come to a melancholy Proof in Public, of what we often see in Private Life, that the original Crime is seldom so great as those which an Attempt to conceal or support it brings on. Like those Women who commit Murder to avoid the Shame of Fornication, the Ministry, that they might not appear to point all their Proceedings to Mr. Wilkes's Case, dared to innovate the Custom of Parliament, and to depart from the only Precedent of Incapacity upon Re-election (that of Sir Robert Walpole, who was declared to be incapable, having been expelled for notorious Corruption and Misapplication of Public Money.) by declaring simply, "That Mr. Wilkes having been expelled, was and is incapable;" making, for the first Time, Expulsion *ex Vi Termini* to include Incapacity. The Freeholders of Middlesex were sent once more to an Election, which ended in an unanimous Return of Mr. Wilkes the third Time.

Upon the Return being called for, no Opposition was made to declaring the Election void, every Body allowing that the Resolution of the House *was binding upon itself*, for the Remainder of the Session. An unsuccessful Attempt was, indeed, made to prevent the issuing a New Writ by those whom the Ministry and their Friends have called *factious*; that the County of Middlesex might have Time to cool before the next Session, and consider whether they could not fix upon some Person as worthy of their Confidence as Mr. Wilkes, and might not chuse to drop a Contest with the House of Commons, in which a Point so essential to the Liberties of all the Freeholders in the Kingdom seemed to be in Danger of an adverse Decision; and that the Members of the House might have Time to consult their Constituents during the Summer Recess, and to see how far the late Proceedings had alarmed the Fears, or met with the Approbation of the People; whose Opinions are by no means to be slighted in Points that affect their Liberties *. Indeed, I will go so far as

* The Voice of the People in Things of their Knowledge is said to be as that of God. *Comm. April, to Jam. I.*

to say, in a free Country they are entitled from their Representatives and Governors to a Sacrifice of Speculative Opinions, even if just, to violent Prejudices in Favour of what they think, tho' mistakenly, their Liberties. In this I would not be understood to speak a Language by any means necessary to support the present Cause, or merely my own Sentiments, but those of former great Ministers, who in the Instances of the Jew and Excise Bills, did not tell the People, that they were bound by, and must submit to, the Decisions of the *whole* Legislature; but wisely, greatly, and constitutionally made a Sacrifice of a new Law to an old Prejudice; preferring the Hearts to the Purse of the People; and thinking the Satisfaction of old Subjects of more Importance than the Acquisition of new ones. If the former Proceedings were approved of, the Ministry would have returned strengthened by the Concurrence of the rest of the Kingdom against the single County of Middlesex. If, on the other Hand, they were generally disapproved of, they would have found themselves at liberty by the Orders of the House to rescind their former Resolutions, and follow
the

the Example of their Predecessors, by preferring the Affection to the Obedience of the People.

Unfortunately it appeared, upon this Occasion, that whatever may be the Virtues and Acquisitions of Administration, Moderation and Popularity are not to be reckoned amongst them. To have stopped here, would have had the Appearance of paying some Attention to the Cries of the People, which were to be stifled, not soothed; and like the Roman Generals, they thought themselves not entitled to triumph till the conquered People had passed under the Yoke. The New Writ was issued; and, to prevent a Repetition of the same Scene of Free Election in the County of Middlesex, and Incapacity in the House of Commons, Col. Luttrell, a young Man, Member for a Cornish Borough, an Officer in the Army, Heir to a good Fortune in England and Ireland, was induced to vacate a Seat which he held by a Constitutional Election, to stand for a County, in which he had neither Property nor Popularity, and could by no means procure a Majority. The Return was
again

again in Favour of Mr. Wilkes; the Election was again declared void.

So far the Contest had been a melancholy one between a Part of the Electors, and the Body of the Electors; still if the House of Commons was wrong, it was only the Oppression of one County, by depriving them for a Time of a Part of their Share in the Representative Body: I say for a Time, because the Resolutions of an House of Parliament are only binding for one Session: But when a Motion was made by a Gentleman in Administration to admit Col. Luttrell, with a great Minority, as the Sitting Member, a new, a more serious, and more alarming Scene opened upon us. It was no longer a speculative or temporary Injury to one Sett of Electors, but an actual Violation of the Rights of every Elector in the Kingdom, that became the Subject of the Debate. Such is the Excellence of our Constitution, that its Strength appears to increase in Proportion to the Danger of the Attack. A single trivial Outwork may sometimes be surpris'd without much Difficulty; but whenever the grand Citadel

Citadel is to be attacked, the Fortifications are found so strong, as to have made every Attack hitherto end in the Destruction of the Assailants. I wish I may be mistaken when I say, I fear they were all upon this Occasion, taken by one *Coup de Main*.—

To justify this Proceeding, it was necessary that the House should have a Power to create Incapacity—That Expulsion *ex Vi Termin*i should convey Incapacity—That the Law and Custom of Parliament should be equal to the Law of the Land—That a single Resolution of one House of Parliament should be that Law of Parliament—That a single Precedent should be that Custom of Parliament—and lastly, That there should be such a Precedent.—A Failure in any one of these Cases made the voting a Man in upon a Minority illegal and unjust. What then must we think of the Attempt, if no one of these Claims is warranted by the Law of Parliament?

To prove that Expulsion *ex Vi Termin*i does not induce Incapacity, there needs but a very slight Inspection into the Journals of the House of Commons, as it will be found there

there, that, wherever they thought a Person incapable, they always declared their Opinion (for I think I shall prove it was no more) in exprefs Terms ; as in the Cafe of Arthur Hall, which is as follows :

“ Anno 23 Eliz. 1580, Mr. Arthur Hall,
 “ Burgeſs for Grantham, for writing a
 “ Book derogatory to the Authority, Pow-
 “ er, and State, of the Commons Houſe
 “ of Parliament, had Judgment, *Nemine*
 “ *contradicente*, 1. To be imprifoned in
 “ the Tower for Six Months, and from
 “ thence till he had made a Retraction
 “ of his Book. 2. To be ſevered and cut
 “ off from being a *Member of that or any*
 “ *future Parliament*. 3. A Fine of Five
 “ Hundred Marks to the Queen. 4. His
 “ Book and flanderous Libel adjudged ut-
 “ terly falſe and erroneous.”

In the 27th of Eliz. Doctor Parry was diſabled to be any longer a Member of the Houſe, and a Warrant directed for chuſing another Member in his Stead.

Sir Christopher Pigot was expelled the House for abusing the Scotch, and committed to the Tower. A Motion afterwards was made that he should be restored.

Nov. 2, 1641, Mr. Benson having granted Protections to several Persons who were not his menial Servants, and having done this with corrupt Intentions, was expelled, and declared unfit and incapable ever to sit in Parliament, or be a Member of that House hereafter.

By these Examples it appears, that where the House meant to declare their Opinion of the Unworthiness of a Member, they did it in express Terms : That in other Cases Members expelled were actually re-admitted ; consequently, that they never understood the Penalty of Incapacity to attend the Sentence of Expulsion.

To prove that Expulsion *ex Vi Termin* does create Incapacity, they have recourse to the Custom of Parliament, which is a Part of the Common Law ; and to prove this

this Custom, they bring one Precedent. I will, therefore, examine how far Custom is a Part of the Common Law, the Force of Precedent in making that Custom, and how far the Precedent quoted will answer that End.

The very Word *Custom* signifies frequent Repetition of the same Act ; and it derives its Authority in the Common Law from a Presumption, that whatever has been repeatedly and uninterruptedly practised for a long Continuance of Time, must have been just in its Origin, and found convenient in the Exercise. Lord Hale, in his History of the Common Law, speaking of that Part of it which is founded upon Custom, says, “ The Common Law
 “ gives to those Customs that it adjudges
 “ reasonable, the Force and Efficacy of
 “ their Obligation. The Common Law
 “ determines what is that Continuance of
 “ Time which is sufficient to make such a
 “ Custom. The Common Law does au-
 “ thoritatively decide the Exposition, Li-
 “ mits, and Extension, of such Customs.
 “ This Common Law, though the Usage,
 D 2 “ Practice,

“ Practice, and Decisions of the King’s
 “ Courts of Justice may expound and
 “ evidence it, and be of great Use to il-
 “ lustrate and explain it ; yet it cannot
 “ be authoritatively altered but by Act of
 “ Parliament.” *Hale’s Hist. of the Com-
 mon Law*, Page 26.

By this it appears to be necessary for a
 Custom, before it can carry with it the
 Force of Law, to be reasonable, and to
 have that *Continuance of Time* which is suf-
 ficient to make such a Custom ; by which
 it is plain, that *some* Continuance is neces-
 sary, and that a single Act cannot, there-
 fore, be called Custom. This is the Doc-
 trine plainly laid down at Common Law,
 as it is observed in Westminster-Hall. It
 remains to enquire, Whether the Custom
 of Parliament is to be judged of by the
 same Rule? I will, therefore, state to you
 what have been the Opinions of able Men
 in Parliament upon what is necessary to
 make that Custom of Parliament which is
 the Law of Parliament.

In D’Ewes’s Journal, Page 638, it is
 said, “ *Ratio Legis* is *Anima Legis* ; and
 “ he

“ he that presents a Precedent without a
 “ Reason, presents a Body without a Soul.”
 The great Lord Cowper, in the Case of
 Ashby and White, says, “ Law depending
 “ on Custom certainly consists not in, and
 “ is not to be made out by, one Act, but
 “ by often reiterated Acts. The Law and
 “ Custom of Parliament, as we conceive,
 “ is to be determined by constant Course
 “ and Practice, and not one Precedent.”
Lords Protest in Sacheverel's Case.

The Use of Precedents in Parliamentary
 Proceedings is not to promote but check
 Innovation, by warning the House (which
 certainly has a Right to do many Things
 for which there are no Precedents, or else
 Precedents could never have existed) to be
 extremely cautious, and maturely to con-
 sider the Expediency of any Step which
 their Ancestors have never found it neces-
 sary to take before (if there be no Prece-
 dent) ; or to consider the Reason and Suc-
 cess of the former Precedent (if there be
 any), to see if their Cases are exactly si-
 milar, and the Event likely to be what is
 desired.

desired. It is not till after reiterated Acts and long Experience of the Advantages of a particular Mode of Proceeding, that the Reasons on which it is founded are to be taken for granted. To suppose that every Thing is to be done for which there is a Precedent, and Nothing for which there is not one, would be to adopt an Idea incompatible with that of the Existence of a Legislative Body; and to give to a single Precedent an Authority equal to that of Custom, founded upon frequent Repetition of the same Act, would be to destroy the Effect of that excellent Rule, calculated to secure our Constitution from the Danger of hasty Innovation. A single Precedent, therefore, in the best Times, formed upon the most equitable Principles, can have no Weight whatsoever but from the Goodness of the Reasons upon which it is founded, and the exact Similarity of the Case from which it arises, to that to which it is to be applied. The very worst Precedents of the most violent Times will do to prove beyond what we ought certainly not to go in a like Occasion; the very re-
curring

curring to Precedent implying a Repugnancy to Alteration, and barring a Possibility of exceeding it; since the Moment it is exceeded, it ceases to be the Rule which is followed and conformed to.

Having thus fairly stated the Parliamentary Doctrine of Precedents upon general Grounds, it remains for me to try this single Precedent by them, and then to allow it its full Force in the present Case, and see if it comes up to what is contended for. The Case is that of Mr. Walpole.

“ On the 23d of Feb. 1711, a Peti-
 “ tion of the Freeman and Free Burghers
 “ of the Borough of Kings-Lynn in the
 “ County of Norfolk, was presented to the
 “ House, and read; setting forth, that
 “ Monday, the Eleventh of February last,
 “ being appointed for choosing a Member to
 “ serve in Parliament for this Borough, in
 “ the Room of Robert Walpole, Esq.
 “ expelled this House, Samuel Taylor,
 “ Esq. *was elected their Burgefs*; but John
 “ Bagg, present Mayor of the said Bo-
 “ rough, *refused to return the said Samuel*
 “ Taylor,

“ *Taylor, though required so to do ;* and re-
 “ turned the said Robert Walpole, though
 “ expelled this House, and then a Pri-
 “ soner in the Tower ; and praying the
 “ Consideration of the House.”

“ March 6th. The Order of the Day
 “ being read for taking into Consideration
 “ the Merits of the Petition of the Free-
 “ men and free Burghers of the Borough
 “ of Kings-Lynn in the County of Nor-
 “ folk, and a Motion being made that
 “ Counsel be called in, upon a Division
 “ it was resolved in the negative. Tellers
 “ for the Yeas, Sir Charles Turner, Mr.
 “ Pulteney, 127. Tellers for the Noes,
 “ Sir Simeon Stuart, Mr. Forster, 212.—A
 “ Motion being made, and the Question
 “ put, That Robert Walpole, Esq. hav-
 “ ing been, this Session of Parliament,
 “ committed a Prisoner to the Tower of
 “ London, and expelled this House, for
 “ an high Breach of Trust in the Execu-
 “ tion of his Office, and notorious Corrup-
 “ tion, when Secretary at War, was, and
 “ is, incapable of being elected a Mem-
 “ ber

“ber to serve in this present Parliament,
 “it was resolved, upon a Division, in the
 “affirmative. Then a Motion being made,
 “and the Question put, That Samuel
 “Taylor, Esq. is duly elected a Burgess
 “to serve in the present Parliament for
 “the Borough of Kings-Lynn in the
 “County of Norfolk, it passed in the ne-
 “gative. Resolved, That the late Elec-
 “tion of a Burgess to serve in the pre-
 “sent Parliament for the said Borough of
 “Kings-Lynn in the County of Norfolk,
 “is a void Election.”

This Precedent is liable to every Ob-
 jection that can be conceived against one.
 It was made in violent Times, without any
 Example ; neither just in the Intention,
 which was certainly to exclude a Mem-
 ber from the House who was formidable
 to the Ministry of the Day, from his Abi-
 lities and Boldness (perhaps the only exact
 Similarity of the Case from which the
 Precedent arose, to that to which it was
 applied), nor honourable in the Event ;
 since the Person so expelled was by all

E succes-

successive Houses suffered to sit for thirty Years, which he certainly would not have been, had they thought him as culpable as that House of Commons which expelled him, and themselves possessed of that censorial Power of which we have lately heard so much. This Precedent, however, such as it is, was strictly adhered to so far as it might seem to give a Sanction to the Persecution of the Party concerned, but slighted in the single Instance where it could possibly have been of any Authority, by preventing the voting in another Person upon a Minority, and serving as a Barrier to the Rights of the Freeholders, against the undiscerning Rage of an Administration, who, in their Eagerness to make a Victim to their Resentment, forgot to avail themselves of the Forms of Law, and by violating the sacred Sanctuary of the Constitution, made a Martyr to Liberty, where they pretended an Example of Justice.

It appears, therefore, that this Incapacity produced by the Expulsion, is so far from being the invariable reiterated Usage
of

of Parliament, which it must have been to be the *Lex & Consuetudo Parliamenti*, that it stands upon a single bad Precedent, incompletely followed, not more ineligible from the Motives which produced, than inapplicable from the Circumstances that attended it; —contradicted by many others where the Incapacities were declared expressly, and modified according to the Opinion of the House. These Precedents have this peculiar Advantage, besides their Number, that they were all in the Cases of Persons at the Time under the Displeasure of the House, and who must consequently be supposed rather to have met with strict Justice than Favour.

Having therefore proved that Incapacity by the Law and Custom of Parliament does not follow of course upon Expulsion,—if I were an Advocate for Mr. Wilkes, I could with the greatest Safety rest my Cause here. The first Sentence not affecting him, (he not having therein been declared incapable, as was done in the Cases of Mr. Hall, Sir Giles Mompeffon, Mr. Benson, and others) the Injustice and Illegality of Enforcing the

E 2

subsequent

subsequent Determination is obvious; so obvious, that I shall content myself with following the Ministerial Mode of quoting one Case, and that not from remote or-obscure Times. — But to prove my Impartiality, and Readiness to do them Justice where they have shewn a Tenderneſs for the Liberties of the Subject, and an Aversion to extending the Powers of the House of Commons, I will take it from the last Session of Parliament. It is the Case of the Cumberland Sheriff (a favourite one of theirs), who was committed to the Custody of the Serjeant for a Violation of the Privileges of Election. It was understood generally that this Gentleman would petition to be discharged, and be of course reprimanded : Indeed, it was one of the Reasons urged against the severer Punishment of sending him to Newgate, which was proposed, that the Disgrace of the Confinement, and the Reprimand he would receive from the Speaker, would be a sufficient Warning to others not to be guilty of the same Crime. When towards the Close of the Session it appeared that this Gentleman was not likely to petition a Motion was made,
That

That he should be brought to the Bar to receive a Reprimand, and be discharged; which was over-ruled, upon its being suggested, that, as it had been omitted to be mentioned in the first Sentence, it would be an unusual and unjustifiable Thing to inflict a second Punishment. This Reasoning prevailed, tho' it had been generally understood that the Reprimand would accompany the Discharge, and was included *ex Vi Terminis* in the first Sentence.

But something more important than the Wrongs or Misfortunes of a single Man having induced me to give you the Trouble of this Letter, I must proceed farther, and see whether the House of Commons is possessed by Law of a Power to incapacitate a Member chosen by the People.

The Power of creating Incapacity*, did it exist at all in the House of Commons,

* Sir Edward Hobby (in Fitzherbert's Case in Queen Elizabeth's Reign) said, " The Party out-lawed is not out of his Wits, therefore capable; and then is a Man able to be chosen, and idoneus to be a Bar-
must

must arise from the Law and Custom of Parliament, founded upon Usage from Time out of Memory. If Usage be a good Law, from a Presumption that the Practice continued so long from the approved Convenience of it, Non-usage and Discontinuance will, at least, give as good Reason to presume it has been found inconvenient, and therefore ceased. But the Case is infinitely stronger, when it appears that a Body so laudably jealous as the House of Commons have ever been of every Thing that relates to the determining the Rights of Election, have found themselves obliged to call in the Assistance of the other Branches of the Legislature, when they thought it necessary, for the Preservation of the Freedom of Election, and Independence of Parliament, to restrain the natural Right of the People to delegate whom they pleased to take care of their Interests, and give their Consent to the Abridgement of their Liberties by Legal Restrictions.

“ goes ”—It is plain the House of Commons in those Days had no Idea of a Power in themselves to create Incapacity.

That

That this has ever been the Case, is notorious from the many Statutes made for this Purpose, not only in the Case of Persons coming under general Descriptions, such as Minors, Persons not possessed of 600 Pounds *per ann.* for Counties, and 300*l.* for Boroughs, but of Persons under particular Circumstances; as, by 30 Char. II. “ those who shall wilfully
 “ presume to sit in the House without tak-
 “ ing the Oaths and subscribing the Test
 “ whenever the House shall require it, eve-
 “ ry Member so presuming to sit shall
 “ *be adjudged, and is declared,* to be un-
 “ capable and disabled in Law, to all In-
 “ tents and Purposes, to sit in the said
 “ House, or give any Voice therein during
 “ that Parliament. And in Case any Member
 “ of the House shall by Virtue of this Act
 “ be disabled to sit or vote in the House,
 “ then, without any further Conviction or
 “ other Proceedings against such Member,
 “ the Place for which he was elected is de-
 “ clared void, and a new Writ shall issue
 “ out of Chancery, by Warrant from the
 “ Speaker and Order of the said House, for
 “ the Election of a new Member in Place
 of

“ of such Member, so disabled to all In-
 “ tents and Purposes, as if such Member
 “ or Members naturally died.”

By the Statute of ⁴⁵ Ann. Cap. 8. “ If
 “ any Person being chosen a Member of
 “ the House of Commons shall accept of an
 “ Office of Profit from the Crown during
 “ such Time as he shall continue a Mem-
 “ ber, his Election shall be, and is hereby
 “ declared to be, void, and a new Writ shall
 “ issue for a new Election, as if such Per-
 “ son so accepting was naturally dead.
 “ Nevertheless, such Person shall be capable
 “ of being again elected, as if his Place had
 “ not become void as aforesaid.”

By the Statute of 7 George I. C. 28. we
 find the late Governor, Deputy-Governor,
 Directors, Cashier, and Accomptant of the
 South-Sea Company, and John Aislabe,
 Esq; disabled for ever to sit or vote in Par-
 liament.

Here we see the whole Legislature, in
 Cases merely relating to the House of Com-
 mons,

mons, declaring Disqualification in all the different Degrees, for the Remainder of the Parliament, for Life, or subject to an immediate Re-election; a Power which had the House of Commons at that Time conceived to have existed singly in themselves, they would never have been contented (from their known and constant Jealousy in whatever relates to their Privileges) to have shared with the other two Branches: Nay, we find them in the first of these Statutes, that of the 30th of Charles II. concurring with the King and Lords, in marking out the exact Difference between the Power of the whole Legislature, by whom the Incapacity *is declared in Law*; and the House of Commons, by whom *it shall be adjudged*.

The Expression, “ That the Writ shall
 “ issue for the Election of a new Member
 “ in the Place of such Member so disabled,
 “ to all Intents and Purposes, as if such
 “ Member was naturally dead,” shews that
 instead of their having an Idea that Expul-
 sion *ex Vi Terminii* conveyed incapacity, the

F
Idea

Idea of created Incapacity was by no means familiar to them, and they thought it necessary to illustrate it by that of a Vacancy made by Death.

So far the Statute Book shews the other Parts of the Legislature joining with the House of Commons in making Laws for regulating Elections of Members to that House: But History informs us the Lords were not always so complaisant, but more than once rejected the Place-Bill, when it had passed the House of Commons, tho' a Bill that related merely to the Seats of Members in that House. Had those Houses thought the Power of creating and declaring Incapacities as inherent in them, as they undoubtedly thought the Exertion of it by the whole Legislature expedient in that Case, they would not have been satisfied with fruitlessly enacting, subject to the Controul of another Body, what they might effectually, and constitutionally have ordained by a single independent Resolution. There cannot surely be a stronger presumptive Proof that the House of Commons

mons did not think themselves at that Time possessed of such a Power, than their having suffered a favourite Regulation to fail by not exercising it.

I will now give you an Account of what were supposed, till this Session, to be the only legal Incapacities to being elected, in the Words of that excellent Constitutional *Writer* Doctor Blackstone; who sagaciously observes, Page 166, Vol. I. “ If any Alteration might be wished or suggested in the present Frame of Parliaments, it should be *in Favour of a more complete Representation of the People*”. That Author says (Page 169, Vol. I.), “ Our second Point is the Qualification of Persons to be elected Members of the House of Commons. This depends upon the Law and Custom of Parliament, and the Statutes referred to in the Margin. And from these it appears, 1. That they must not be Aliens born, or Minors 2 That they must not be any of the twelve Judges, because they sit in the Lords House; nor of the Clergy, for they sit

“ in the Convocation ; nor Persons attaint-
 “ ed of Treason or Felony, for they are
 “ unfit to sit any where. 3. That Sheriffs
 “ of Counties, and Mayors and Bailiffs of
 “ Boroughs, are not eligible in their re-
 “ spective Jurisdictions, as being returning
 “ Officers ; but that Sheriffs of one Coun-
 “ ty are eligible to be Knights of another.
 “ 4. That in Strictness all Members ought
 “ to be Inhabitants of the Places for which
 “ they are chosen : But this is entirely dis-
 “ regarded. 5. That no Persons concern-
 “ ed in the Management of any Duties
 “ or Taxes created since 1692, except the
 “ Commissioners of the Treasury, nor any
 “ of the Officers following (viz. Commis-
 “ sioners of Prizes, Transports, Sick and
 “ Wounded, Wine Licences, Navy, and
 “ Victualling ; Secretaries or Receivers of
 “ Prizes, Comptrollers of the Army Ac-
 “ counts, Agents for Regiments, Governors
 “ of Plantations and their Deputies, Offi-
 “ cers of Minorca or Gibraltar, Offi-
 “ cers of the Excise and Customs, Clerks
 “ or Deputies in the several Offices of the
 “ Treasury, Exchequer, Navy, Victualling,
 “ Admi-

“ Admiralty, Pay of the Army or Navy,
 “ Secretaries of State, Salt, Stamps, Ap-
 “ peals, Wine Licences, Hackney Coaches,
 “ Hawkers and Pedlars), nor any Persons
 “ that hold any new Office under the
 “ Crown created since 1705, are capable
 “ of being elected Members. 6. That no
 “ Person having a Pension under the Crown
 “ during Pleasure, or for any Term of
 “ Years, is capable of being elected. 7.
 “ That if any Member accepts an Office
 “ under the Crown, except an Officer in the
 “ Army or Navy accepting a new Commis-
 “ sion, his Seat is void; but such Mem-
 “ ber is capable of being re-elected. 8.
 “ That all Knights of the Shire shall be
 “ actual Knights, or such notable Esquires,
 “ and Gentlemen, as have Estates sufficient
 “ to be Knights, and by no Means of the
 “ Degree of Yeomen. This is reduced to
 “ a still greater Certainty, by ordaining, 9.
 “ That every Knight of a Shire shall have
 “ a clear Estate of Freehold or Copyhold to
 “ the Value of Six Hundred Pounds per Ann.
 “ and every Citizen and Burgess to the Va-
 “ lue

" lue of Three Hundred Pounds ; except
 " the eldest Sons of Peers, and of Persons
 " qualified to be Knights of Shires, and ex-
 " cept the Members for the two Universities ;
 " which somewhat ballances the Ascen-
 " dant which the Boroughs have gained
 " over the Counties, by obliging the trad-
 " ing Interest to make choice of landed
 " Men. And of this Qualification the
 " Member must make Oath, and give in
 " the Particulars in Writing at the Time of
 " his taking his Seat. *But, subject to these*
 " *Restrictions * and Disqualifications, every*
 " *Subject of the Realm is eligible of common*
 " *Right.* It was therefore an unconstitu-
 " tional Prohibition, which was inserted
 " in the King's Writs for the Parliament
 " holden at Coventry 6 Henry IV. That
 " no Apprentice or other Man of the
 " Law should be elected a Knight of the
 " Shire therein."

* I do not find Expulsion from the House amongst
 the Author's Restrictions, and much doubt whether
 he would suggest or wish for such an Alteration
 in Favour of a more complete Representation of the
 People.

By

By *Common Right*, I suppose this Author means a Right founded in the Common Law, which Lord Hale says, (*Hist. Com. Law*, Page 26.) cannot be authoritatively altered or changed ^{by} by Act of Parliament: Yet upon this Occasion it is to be altered by a Resolution of the House of Commons, which, we are told, is the Law of Parliament, and that is the Law of the Land (I presume a Part of the Common Law, for I know of no Law but the Common Law and Statute Law, and this is certainly no Part of the Statute Law). Here we have a Specimen of that Confusion and Contradiction which must ever arise from the smallest Departure from the antient fixed Rules of Law; here we have Common Law in direct Contradiction to Common Law; a Man at once eligible by Common Law, and ineligible by Common Law.

It is not only the Right of the Person elected to sit that is disputed, but the Right of the Electors to be represented by the Man of their Choice, and by him only.

I will

I will, therefore, briefly state to you, from the best Authorities, what this Right is, from whence derived, how confirmed, and how restrained.

The Knights of the Shires represent all the Freeholders of the Counties. Anciently, every the least Freeholder had as much Right to give his Suffrage as the greatest Owner of Lands in the County. This Right was a Part of his Freehold, and inherent in his Person by Reason thereof; and to which he had as good a Title as to receive the Profits of his Soil. This appears by the Statute of Hen. VI. Cap. 9, which recites the great Inconveniencies which did arise in the Election of Knights of the Shires, by Men that were of small Substance, who pretended to have an equal Right with Knights and Esquires, of the same County; therefore that Right was abridged, and confined only to such Persons as had Forty Shillings per Annum. But thereby it appears, That the Right which a Freeholder hath to vote in the Election.

Election for Knights of the Shire, is an original and fundamental Right belonging to him as a Freeholder.

It is certainly a great Advantage for the Men or Inhabitants of a Place to chuse Persons to represent them in Parliament, who thereby will have an Opportunity, and be under an Obligation to represent their Grievances, and advance their Profit. Of this Opinion have two Parliaments been, as appears by two several Acts; the one, 34th and 35th Hen. VIII. Cap. 13. the other, 25th Car. II. Cap. 9.

The first is an Act for making Knights and Burgeſſes within the County and City of Cheſter, which begins in this Manner:
 “ In humble Wiſe ſhew to your Maſteſty
 “ the Inhabitants of your Grace’s County
 “ Palatine of Cheſter; That they being ex-
 “ cluded and ſeparated from your high
 “ Court of Parliament, to have any Bur-
 “ geſſes within the ſaid Court, by Reaſon
 “ whereof the Inhabitants have hitherto
 “ ſuſtained manifold Loſſes and Damages,

as well in their Lands as Goods and Bodies; therefore it was enacted, That they should have Knights for the County, and Burgeſſes for the City of Cheſter.

The other Act, which conſtitutes Knights and Burgeſſes for the County Palatine and City of Durham, recites, “ That the In-
 “ habitants thereof have not hitherto had
 “ the Liberty and Privilege of electing and
 “ ſending Knights and Burgeſſes to the
 “ high Court of Parliament.”

The Application of theſe two Acts is very plain. “ The firſt ſaith, To be ex-
 “ cluded from ſending Knights and Bur-
 “ geſſes to Parliament, is a Damage to
 “ Lands, Goods and Body.” The other ſaith, “ That it is a Liberty and Pri-
 “ vilege to ſend them.” Thus the Right of Election is explained, and ſhewed to be a legal Right; That of electing Knights of the Shires belonging to, and being inherent in the Freeholder *.

* Lords Caſe of Aſhby and White.

“ It is absurd to say, the Electors Right of
 “ chusing is founded upon the Law and Cus-
 “ tom of Parliament: *It is an original Right,*
 “ *Part of the Constitution of the Kingdom, as*
 “ *much as a Parliament is, and from whence*
 “ *the Persons elected to serve in Parliament do*
 “ *derive their Authority, and can have no*
 “ *other but that which is given them by*
 “ *those that have the original Right to chuse*
 “ *them*.*”

“ Your Majesty’s Royal Writ commands,
 “ that the several Electors make Choice of
 “ Persons to represent them in Parliament,
 “ in order to do, and consent to, such
 “ Things as should be ordained there,
 “ relating to the State and Defence of
 “ the Kingdom and the Church, for which
 “ the Parliament is called: And they obey
 “ the Command, in proceeding to chuse
 “ Members for the Parliament then sum-
 “ moned; but neither the Writ which re-
 “ quires them to chuse, nor the Indenture
 “ by which the Return is made, import

* Lords State of the Case of Ashby and White.

“ any Thing whereby it may be inferred,
 “ that the Electors put into the Power of
 “ their Representatives their several Rights
 “ of Elections, to be disposed of at their
 “ Pleasure.

“ It was an Interest vested in them by
 “ Law before the Election, and which the
 “ Law will preserve to them to be exer-
 “ cised again in the like Manner, when
 “ your Majesty shall be pleased to call ano-
 “ ther Parliament *.”

“ The Right of the Liberties of the
 “ Commons of England consisteth chiefly
 “ in three Things: First, that the Shires,
 “ Cities, and Boroughs of England, by Re-
 “ presentation to be present, have FREE
 “ CHOICE of such Persons as THEY SHALL
 “ PUT IN TRUST to represent them §.”

“ In the high Court of Parliament, all
 “ the whole Body of the Realm, and

* Lords Representation in the Case of Ashby and White.

§ House of Commons Apology to James I.

“ every Particular Member thereof, either
 “ in Person or by Representation, (upon
 “ their own free Elections) are, by the
 “ Laws of the Realm, deemed to be per-
 “ sonally present *.”

“ It is enacted, That Elections should
 “ be freely and indifferently made, not-
 “ withstanding any Prayer or Command-
 “ ment to the contrary, *sine Prece vel Pretio*,
 “ without any Prayer or Gift, and *sine Præ-*
 “ *cepto*, without Commandment of the
 “ King by Writ, or otherwise, or of any
 “ other §.”

A Right so founded can only be con-
 trouled by the Supreme Legislative Power,
 or some Power in that Case equal to the
 Supreme Legislature. The Supporters of
 this Measure assert, That a Resolution of
 the House of Commons is of that Force.

If this Doctrine is to prevail, That a Re-
 solution of the House of Commons is the

* 1 Jac. I. Cap. 1.

§ Statute 7 Hen. IV.

Law of the Land in any, even Cases of Election, it may not be amiss to see what Sort of Law we live under ; and I believe it will be found, contrary to the general Opinion, to be the worst constituted and worst administered Law in any civilized Country.

In the Case of Arthur Hall, the House expelled him, and made him incapable in that and all future Parliaments ; he was fined 500 Marks to the Queen, and to be imprisoned six Months. The Attorney-General was declared in 1614 incapable to be elected. In 1680, December 30, it was resolved, *nem. con.* “ That no Member of
 “ this House shall accept of any Office or
 “ Place of Profit from the Crown without
 “ the Leave of the House, nor *any Promise*
 “ *of any such Place* or Office during his be-
 “ ing or continuing a Member of the House.
 “ That all Offenders herein be expelled the
 “ House.” All these Resolutions are unrepealed, and consequently, by this Doctrine, Part of the Law of the Land ; so that the Attorney-General is actually sitting in Parliament under

der a Legal Disqualification; and by the other Resolution there is now a Vacancy for the County of Middlesex, as I believe Nobody doubts Col. Luttrell having been promised the Chiltern Hundreds before he vacated his Seat; and consequently must be incapable, according to those who maintain that Incapacity and Expulsion are inseparable.

The Powers, of fining to the Crown, of imprisoning for six Months, and rendering incapable for all future Parliaments, are nowhere that I know of formally renounced; and yet I believe Nobody will contend, that they exist at present in the House of Commons: Yet if any Resolution of the House is Law, every Resolution must be so; Law being fixed, and certain; and the Moment its Power depends upon its Reasonableness, it ceases to be Law, and becomes a Counsel.

I believe it will not be difficult to convince every impartial Man, that the late Proceedings

ceedings are upon no Ground less entitled to Authority than upon that of Reason.

I will readily admit that the House of Commons have, upon many Occasions, assumed to themselves a Power of declaring, and dispensing with the Law: But I must add, that whenever they have done so, their Resolutions have been a Disgrace to the Journals, and a melancholy Proof to what criminal and absurd Excesses a Popular Assembly may proceed, when they mistake Power for Right, and substitute Will for Law.

To prove this, I will quote some Resolutions of the House assuming this Power, the Opinion of Constitutional Writers, with that of the other Branches of the whole Legislature, upon this pretended Right of one Branch, to declare or enact the Law without the Concurrence of the rest.

“ March 22d, 1641, Resolved, That when
 “ the Lords and Commons in Parliament
 “ shall

“ shall declare what the Law of the Land is.
 “ To have this not only questioned and con-
 “ troverted but contradicted, and a Com-
 “ mand given that it be not obeyed, is a
 “ high Breach of the Privilege of Parlia-
 “ ment.”

“ Jan. 1648. Resolved, That the Com-
 “ mons of England in Parliament assembled
 “ do declare, That the People are, under
 “ God, the Original of all just Power.

“ And do also declare, That the Com-
 “ mons of England in Parliament assembled
 “ being chosen by, and representing the
 “ People, have the supreme Power in this
 “ Nation.

“ And do also declare, That whatsoever
 “ is enacted or declared for Law by the
 “ Commons in Parliament assembled,
 “ hath the Force of a Law; and all the
 “ People of this Nation are concluded there-
 “ by, although the Consent and Concur-
 “ rence of the King or House of Peers be
 “ not had thereunto.”

“ Feb. 9th, Resolved, That it hath been
 “ found by Experience, and that this House
 “ doth declare, That the Office of a King
 “ in this Nation, and to have the Power
 “ thereof in any single Person, is unneces-
 “ sary, burthensome, and dangerous to the
 “ Liberty, Safety, and Public Interest of the
 “ People of this Nation ; and therefore ought
 “ to be abolished.”

“ In 1681 the House of Commons passed
 “ two Votes. One, That the Laws against Re-
 “ cusants ought not to be executed against
 “ any but those of the Church of Rome.
 “ The other Vote was, That it was the Opi-
 “ nion of that House, that the Laws against
 “ Dissenters ought not to be executed. This
 “ was thought a great Invasion of the Le-
 “ gislature, when one House pretended to
 “ suspend the Execution of Laws; which
 “ was to act like Dictators in the State;
 “ for they meant that Courts and Juries
 “ should govern themselves by the Opi-
 “ nion that they now gave; which, instead
 “ of being a Kindness to the Nonconformists,
 “ raised

“ raised a new Storm against them over all
 “ the Nation *.

“ There is no Act of Parliament but must
 “ have the Consent of the Lords, the Com-
 “ mons, and the Royal Assent of the King.
 “ Whatsoever passeth in Parliament by this
 “ Threefold Consent, hath the Force of
 “ an Act of Parliament.

“ The Difference between an Act of
 “ Parliament and an Ordinance of Parlia-
 “ ment is, for that the Ordinance wanteth
 “ the Threefold Consent, and is ordained
 “ by one or two of them.

“ Ordinance in Parliament cannot take
 “ away common Right.

“ The Commons petition that the Peti-
 “ tion of the Commons in the fiftieth Year
 “ of Edw. III. whereunto the King's An-
 “ swer was, ‘ The King willeth the same
 “ may be made in Acts, for that some affirm

* Burnet's Hist. of his own Times.

“ them to be but Ordinances and not Acts ;
 “ to which the Answer was, ‘ It is in part
 “ done, and the rest the King will do ac-
 “ cordingly *.”

“ The Law of the Realm cannot be chang-
 “ ed but by Act of Parliament: *Merito in*
 “ *Parl. conquesti sunt* (the Clergy upon the
 “ making the Act *Articuli Cleri*) *quia Lex*
 “ *Angliæ sine Parliam. mutari non potest*†.”

On the Restoration of King Charles II.
 the Commons resolved, “ That this House
 “ doth agree with the Lords, and do own
 “ and declare, That, according to the antient
 “ and fundamental Laws of this Kingdom,
 “ the Government thereof is, and ought to
 “ be, by King, Lords, and Commons.”

By the Act of 13 Ch. II. “ And because
 “ the Growth and Encrease of the late Dis-
 “ orders did proceed (above all) from a wil-
 “ ful Mistake of the Supreme and Lawful
 “ Authority, whilst Men were forward to

* Hale on Par. Page 31 to 34. † Ibid. Page 87.

“ cry up and maintain *those Orders and Or-*
 “ *dinances to be Acts legal and warrantable,*
 “ which in themselves had not the least
 “ Colour of Law or Justice to support them,
 “ from which Kind of Distempers as the pre-
 “ sent Age is not yet wholly freed, so Posterity
 “ may be apt to relapse into them, if a timely
 “ Remedy be not provided :—And that no
 “ Man hereafter may be misled into any sediti-
 “ ous or unquiet Demeanour, out of an Opinion
 “ that both Houses of Parliament, or either
 “ of them, have a Legislative Power with-
 “ out the King ; all which Assertions have
 “ been seditiously maintained by some
 “ Pamphlets lately printed, and daily pro-
 “ moted by the active Enemies of our Peace
 “ and Happiness : Be it therefore Enacted
 “ by the Authority aforesaid, If any Person
 “ or Persons shall maliciously and advisedly,
 “ by Writing, Printing, Preaching, or
 “ other Speaking, express, publish, utter,
 “ declare, or affirm, That both Houses of
 “ Parliament, or either House of Parliament,
 “ have or hath a Legislative Power without
 “ the King, *or any other Words to the same*
 “ *Effect*, that then every such Person and
 “ Persons

“ Persons as aforesaid so offending, shall
 “ incur the Danger and Penalty of a Pre-
 “ munire.”

“ It was never yet heard (when there
 “ was a House of Lords in being, and a
 “ King or Queen upon the Throne), that
 “ the House of Commons alone claimed
 “ a Power, by any Declaration of theirs,
 “ to alter the Law, or to restrain the Peo-
 “ ple of England from taking the Bene-
 “ fit of it ; nor have their Declarations any
 “ such Authority as to oblige Men to sub-
 “ mit to them at the Peril of their Liberty.
 “ If they have such a Power in any Case,
 “ they may apply it to all Cases as they
 “ please ; for when the Law is no longer
 “ the Measure, Will and Pleasure will be
 “ the only Rule.

“ The Certainty of our Laws is that
 “ which makes the chief Felicity of Eng-
 “ lishmen : But if the House of Commons
 “ can alter the Laws by Declarations, or
 “ (which is the same Thing) can deprive
 “ Men of their Liberty, if they go about
 “ to

“ to take the Benefit of them, we shall
 “ have no longer Reason to boast of that
 “ Part of our Constitution.—Resolved, that
 “ neither House of Parliament have Power,
 “ by any Vote or Declaration, to create to
 “ themselves new Privileges not warranted
 “ by known Law and Custom of Parlia-
 “ ment*.”

“ It is God alone who subsists by him-
 “ self; the Right of Crowns and King-
 “ doms, and all other Things exist in mu-
 “ tual Dependence and Relation. The So-
 “ vereignty, Honours, Lives, Liberties and
 “ Estates of all, are under the Guard of
 “ the Law, which, when invaded by Fraud,
 “ or Wit, or destroyed by Force, a dis-
 “ mal Confusion quickly veils the Face of
 “ Heaven, and brings with it horrid Dark-
 “ ness, Misery, and Desolation; Rapine,
 “ Plunder, and Cheating, both private and
 “ public, will be allowed and protected;
 “ continual Rebellions, unjust Proscrip-
 “ tions, villainous Accusations, and Whip-

* Lords Representation in the Case of Ashby and White.

“ pings, illegal and lasting Imprisonments
 “ and Confiscations, dismal Dungeons, tor-
 “ menting Racks and Questions, arbitrary
 “ and martial Law, Murders, inhuman
 “ Affaffinations, and base and servile Flat-
 “ teries, multiplied by Revenge, Ambition,
 “ and insatiable Avarice, will become the
 “ Common Law of the Land. All these,
 “ and Myriads more, will be enacted for
 “ Law, by Force or Fraud. All which
 “ that wise King James well understood,
 “ who saith, That not only the Royal
 “ Prerogative, but the People’s Security of
 “ Lands, Livings, and Privileges, were
 “ preserved and maintained by the *ancient*
 “ *fundamental Laws, Privileges, and Customs*
 “ *of this Realm* ; and that by the abolish-
 “ ing or altering of them, it was impossible
 “ but that present Confusion will fall upon
 “ the whole State and Frame of this King-
 “ dom. And his late Majesty, of ever-
 “ blessed Memory, was of the same Mind
 “ and Opinion, when he said, The Law
 “ is the Inheritance of every Subject, and
 “ the only Security he can have for his
 “ Life or Estate ; and which being neg-
 “ lected

“ lected or difesteemed (*under what spe-*
cious Shew whatever), a great Measure
 “ of Infelicity, if not an irreparable Con-
 “ fusion, must, without Doubt, fall upon
 “ them *.”

Having, therefore, proved that a Resolution of the House of Commons cannot make Law, it follows of Course, that a Resolution of that House can be of no Force which manifestly counteracts the Purpose of an Act of Parliament; as in this Case an arbitrary Power to annihilate the Votes of a Number of Freeholders, would take away the Benefit of the Act fixing the Right of Election, by the last Determination of the House, to prevent Uncertainty in the Right of voting. It follows, also, that the Rights of the Electors and Elected, being both founded on the Common, and confirmed by the Statute, Law, cannot be affected by a Resolution of the House of Commons, merely as such. It remains to enquire, Whether such a Resolution, under any

* Petyt's Mis. Parl.

particular Circumstances, can have that Effect ?

The first Circumstance in which I shall consider it is, as the Sentence of the House of Commons acting as a Court, and exercising their judicial Power over their own Members.

It is agreed on all Hands, that the House of Commons have a Power to punish their own Members by imprisoning, suspending, and expelling them. The Decisions of Courts only bind as a Law upon the Party, as to the particular Case in Question ; but cannot make a Law, properly so called, for That only the King and Parliament can do ; therefore the Interest of the Electors can by no Means be affected by a Sentence passed upon a particular Member.

There is hardly any Power, however preposterous, that has not, at some Time or other, been assumed by the House of Commons acting as a Court. It is not to

be wondered at, therefore, if their Proceedings against their own Members, who have been the Objects of momentary Resentment, or Party Violence, have been some Times unjustifiable. Whenever, therefore, a Power, which has been claimed or exercised upon suspicious Occasions, has been receded from in cooler Times; it is but fair to look upon the Exercise rather as an Usurpation than a Precedent; because, as Lord Hale * observes, “ Greater Weight
 “ is to be laid upon the Judgment of any
 “ Court when it is exclusive of its Juris-
 “ diction, than upon a Judgment of the
 “ same Court in Affirmance of it.”

The House has, at Times, claimed the Power of imprisoning for a Time certain, of fining, of declaring incapable for ever, or during a whole Parliament. It is now universally admitted that Punishments inflicted by the House of Commons determine with the Session, even in Cases

* Hist. of the Common Law, Page 49.

of Contempt of the Court (in which Cases the Power of all Courts to punish is greatest). Upon this Occasion, however, it is contended, That the House have a Power of punishing a Member by rendering him incapable of being elected during the Remainder of that Parliament.

It appears absurd at first Sight; That the only Case in which the House should have a Power beyond the present Session, should be in one that must last for the whole Parliament. When such an Exception is contended for to a general Rule, it is natural to expect that those who contend for it should produce very strong Reasons for such a Deviation from the established fundamental Principles. No such Reasons have been offered, nor do any suggest themselves to me, which do not prove too much or too little. If we are to suppose the House always right in their Judgments, one Parliament is too short a Duration for the Sentence; since it must be as detrimental to the Community to have an improper Person sit in a future, as in the subsisting Parlia-

Parliament ; therefore the Sentence should be for life : But this Power is disclaimed now, tho' exercised in Mr. Hall's Case. If, on the other Hand, we are to suppose the House may be mistaken in an hasty Vote, the whole Parliament is too long a Time for the Culprit to suffer.

There is another very striking Objection to this Period of the Remainder of the Parliament. It is impossible that in a well ordered Government Punishments should be fortuitous, tho' they may be discretionary. Can it be supposed that a Crime committed upon the Eve of a Dissolution of the Parliament should be sufficiently punished by a few Days Exclusion ; which being committed a few Weeks later, would have deserved a seven Years Punishment ? I can hardly suppose so absurd an Idea, as that the Effect of the Sentence should cease with the Existence of the Judges.—Till the present Reign, the Twelve Judges were only for the Life of the King ; but I never heard that it was supposed that the Decrees of those Judges lost their Force, upon the Demise

mise of the Crown; nor do the Judgments of the House, *founded upon Law*, as in the Case of determining who have the Right of voting in Elections, lose their Force in subsequent Parliaments.—Every Argument, therefore, for a longer Punishment than during the Session, holds more strongly for a perpetual Exclusion; and every Argument against a perpetual Exclusion, proves strongly the Necessity of restraining this Power of depriving the Member of his Seat to the subsisting Session: I say, depriving the Member of his Seat, because the House have undoubtedly a Power by Commitment or Suspension to prevent his exercising his Privilege as a Member; but I deny their Right to render him incapable of being elected, as that would affect the Rights of the Electors to send whom they please to represent them; which cannot be done obliquely by a Sentence of Condemnation, to which they are not Parties. The only Power the House has, is to send the Person back to them for their Approbation or Rejection.

I am

I am aware that those Precedents will, at first Sight, seem to contradict this, which declare a Member to be disabled either from sitting in any future Parliament, or in the present Parliament: But (without insisting too much upon the Ambiguity of the latter Phrase, which may only mean for the Remainder of the Session, *for every Session of Parliament is in Law a several Parliament* *, I shall answer that by observing, That the House only declared their Opinion of the Degree of Unworthiness in the Member expelled; and had the People never exercised their Right of sending back again the Man so reprobated, it would only have proved, that they were in some Instances induced by the Justice of the Sentence not to exercise, and in others deterred by the Violence of the Times, from claiming their Right; but it would by no means have followed, that they were not possessed of that Right.

But the Precedents of Parliament furnish us with Proofs of the contrary. It ap-

* Hale on Parliaments, Page 38.

appears by Mr. Hall's fourth Case, that the
 Burgeſſes of Grantham petitioned the Houſe,
 by Mr Markham, againſt Mr. Hall; ſetting
 forth, amongſt other Things, " That, not-
 " withſtanding he had in *ſome* of the former
 " Parliaments, in which he had been re-
 " turned a Burgeſs for the ſaid Borough,
 " been for certain Cauſes the Houſe then
 " moving, diſabled for ever afterwards to
 " be any Member of this Houſe at all,
 " hath of late brought a Writ againſt the
 " ſaid Inhabitants for Wages, &c." The
 Houſe afterwards appointed a ſelect Com-
 mittee to inquire into it, who did not declare
 that Mr. Hall had no Right to the Wages,
 becauſe he had been declared incapable (which
 was the Fact) previous to one of thoſe Par-
 liaments, but they *deſired* him to remit thoſe
 Wages; " and they found him *very conſer-*
 " *mable to condeſcend to ſuch Requeſt.* And
 " he further alledged, and affirmed to them,
 " he would have remitted the ſame, had the
 " Burgeſſes made Suit to him ſo to do; and that
 " he was very willing to do what was agree-
 " able to the Houſe. *Which being well liked*
 " of

“ of *by the House*, it was ordered to be entered accordingly.”

Here is no Appearance of Compulsion ; on the contrary, a plain Proof that he was entitled to all the Privileges and Rights of a Member by the Election of the People, notwithstanding the Incapacity *previously* declared by the House.

Sir William Pennyman and Mr. Holborne were both expelled August 11, 1642, and disabled ; and yet appear both, by the Journals, to have sat afterwards ; tho’ the Returns of the Writs do not appear.

The Case of Mr. Glyn appears still stronger in Favour of the Rights of the Electors.—“ June 7th, 1648, A Petition presented, filed the Humble Petition of the
“ Burgeſſes, Aſſiſtants, Gentry, and others,
“ Inhabitants of the City of Weſtminſter ;
“ the which was read ; and was to deſire,
“ That John Glyn, Eſq; whom they had
“ elected for their Burgeſſes, might be admitted to his former Liberty to ſit and ſerve
“ as a Member of this Houſe.—Reſolved,

“ That the Order 7 Sept. 1647, for dis-
 “ charging John Glyn, Esq; Recorder of
 “ the City of London, from being a Member
 “ of this House, be, and is hereby re-
 “ voked.”

No Objection can lay against Precedents drawn from these Times : I quote them against unreasonable Claims of the House of Commons, as I would an Act of Hen. VIIIth. or James Ist against the Prerogative : It is plain therefore, that Precedent does not authorize this Doctrine.

The Advocates for this Measure have recourse to an Assertion, which, could it be proved just, would have more Weight than all the Precedents, supposing them uncontradicted, that Industry could glean, or Party Violence furnish from the Journals. They assert, That it is impossible the House should exist, unless possessed of such a Power.

I readily admit that the People, when they chuse their Representatives, by that Choice invest them with every Power over
 their

their Liberties that can be necessary for the Discharge of their Trust; but I, at the same Time, assume, That the Representative Body can neither by Usurpation or Custom acquire any Powers over the Rights, which are not absolutely necessary for the Welfare of the People; for whose Use, and in whose Right alone, are they possessed of any Powers or Privileges.

The Privileges of the House of Commons are like the Shell of the Tortoise, to prevent them from being crushed by the Weight of higher Powers; not like the Strength of the Lion, to enable them to destroy those who are helpless. “ That certainly can never
 “ be esteemed a Privilege of Parliament,
 “ that is incompatible with the Rights of the
 “ People.”

To see, therefore, whether the House is possessed of a Privilege, it is necessary to enquire on the one Hand, what is the possible Inconvenience to be guarded against, and what is the Degree of *legal Probability* that it should happen; and on the other Hand, how far the Remedy proposed will be effectual for

the Purposes intended, and what are the bad Consequences to be apprehended from it.

The Privilege contended for, in this Case, is, a Power in the House of Commons to declare by a single Vote a Member, legally qualified in all other Respects, incapable of being re-elected in that Parliament. The Evil complained of, and for which this is the supposed Remedy, is the Possibility of a Person unworthy of a Seat in the House of Commons, sitting there by the Choice of the Electors; which, it is said, would be a Degradation of that Assembly, and of dangerous Consequence to the Constitution. This Evil seems, however, to be already sufficiently guarded against. The undoubted Power of the House of Commons to expel a Member for any Crime notorious before his Election, and thereby send him back to his Constituents for their Approbation or Rejection, secures the Electors from those Inconveniences which might arise from the Continuance of a Member whom they may in the first Instance have inadvertently chosen, without being deprived of the Right of
again

again employing him *, if his Crimes shall not appear to them to be such, as render him unfit for their Service, or unworthy of their Confidence.

The Laws fixing the Qualifications of Electors prevent any Persons who have not an Interest in the Conduct, from having a Voice in the Appointment of a Member. The Laws preventing Minors, Idiots, and Lunatics, from voting, deprive those of the Exercise of their Right, who are not capable of judging of their Interest.

The necessary Qualifications of Persons to be elected, have, in the Eye of the Law, rendered the Choice of an improper Person improbable. Under all these Precautions it is to be presumed, the People may with Safety be trusted with the free Exercise, upon an Expulsion, of that Right which the fundamental Principles of the Constitution have vested in them. Could

* The Case of Members whose Seats are vacated by the Acceptance of Places, is somewhat similar to this.

we, however, for a Moment suppose them, contrary to all Probability, wilfully to persist, against their known Interest, in intrusting the Care of their most valuable Privileges to a Man who had proved himself unworthy of their Confidence; it might follow, that People so infatuated ought not to have a Power of sending any Representative; but no Conclusion can be drawn from thence, that other People should appoint their Delegate for them; nor any Supposition formed, that if they were by this new Privilege prevented from returning the old Member, they would substitute a more worthy one in his Place.

The Inconveniences that might arise from an Abuse of this Power are obvious: A prevailing Party might, by an hasty Vote, exclude the most worthy Member, for no other Reason than his being obnoxious to a bad Ministry; nay, if it once came to be the established Law of Parliament, that a single Vote of that House could incapacitate a Member; Forty Members might, in one Day, deprive the People irretrievably for seven Years of the Services

Services of the most able Men. History and Experience justify the Apprehension, by shewing us that Fifty Members were expelled in one Day.

But, without recurring to the Supposition of intended Injustice, it is possible that the House may be mistaken in a single Vote. This the Law presumes may happen, and has actually guarded against, by making it necessary, that whatever is to have the Force of Law should thrice receive the Approbation of each House, and the Royal Assent afterwards ; the Laws of this Country being, as Mr. Waller justly expresses it, like Gold seven Times tried. It is plain therefore, that neither Reason nor Precedent authorize the Exercise of such a Power in the House of Commons sitting as Judges upon their own Members.

The only remaining Circumstance under which I am to consider a Resolution of the House of Commons is, in the Exercise of their Power to judge of Election Causes ; which brings me to the Determination of the House on the 8th of May.

The Declaration on the 14th of April, I can by no Means look upon in any other Light than that of an extra-judicial Resolution, and, as such, already proved of no Force; with this Difference only from any Thing hitherto observed, That Mr. Wilkes's Election having been previously declared void, the only Question was, Whether the House should nominate the Person who had the Minority of Votes, or direct the County of Middlesex to proceed to another Election? The Cause was, however, taken up precipitately upon the Suggestion of one of the Judges, at the Request of neither of the Parties, without any Council being heard, and without the Knowledge of one of them; with such avowed Secrecy, that, though an Accident prevented the Motion being made the Day it was intended, no Intreaties could prevail upon the Mover to communicate the Purport of it. To treat this therefore as a judicial Decision, would be to offer the highest Affront to a free Assembly, in which timely Notice, and a fair Hearing of both Parties, have hitherto ever been, and I trust will ever remain, essential

tial Circumstances in their judicial Proceedings.

Much Pains have been taken upon this Occasion, by the Advocates for this Measure, to prove what never has been disputed by its Opponents ; The Power of the House of Commons to determine in all Cases of Election without Appeal. It is the Abuse, and not the Exercise, of this Power that is complained of ; not, that the Constitution has vested in them the Power of judging according to Law ; but, that they have assumed to themselves a Power incompatible with the Idea of a Court of Justice ; That of making the Law first, by which they are afterwards to judge, and thereby adding the Power of the Legislature, which is *Jus dare*, to that of the Judge, which is *Jus dicere*.

The Power of the House of Commons is that of a Court of Appeal from the returning Officer. All Courts of Appeal ought to judge by the same Law as the Courts from which the Appeal is brought.

It was allowed, indeed, that the Sheriffs had not acted amiss upon this Occasion, by keeping their Oaths, and conforming to the Directions of the Acts of Parliament : But it was said, the Resolutions of the House, whatever they might be elsewhere, were certainly Law within those Walls ; therefore, though the Sheriffs ought, by the Law of the Land, to return Mr. Wilkes upon a Majority, We, by the Law of Parliament, ought to seat Mr. Luttrell upon a Minority.

Such were the Arguments that were gravely used by very respectable Authorities of the Law, in Support of this Question. Nobody doubts that the Law of England is Law in the House of Lords ; yet if *that* House were to judge a Cause upon an Appeal from the Court of Session by *that* Law, in a Point where it differs from the Law of Scotland, Every-body would, I believe, doubt the Equity, though Nobody could the Efficacy, of the Decision.

Inferior

Inferior Courts having Judicature, and abusing it, are amenable to, and may be punished by, Parliament. There is no Controul over the Commons, if they judge wrong in Cases of Election; as among the Antients there was no Punishment for Parricide, not because it was no Crime, but because their Legislators thought it impossible the Offspring should destroy the Parent from whom it derived its Existence. To suppose an House of Commons so constituted as to be adverse to the People, is to suppose Something unnatural: which, did it for a Moment exist, should, like all other Monsters, be stifled at its Birth, lest it should grow up a Disgrace to its Nature, and a Curse to its Parent.

I have troubled you with this minute Discussion of every possible Pretence to this Right, because I thought it necessary to set this Transaction in its true Light, to shew that the Arguments used in Favour of the Question were the Language of Deceit not Error, and to prove that a Claim of the

greatest Importance, and the first Impression, was not even founded upon an Abuse of Right, or Perversion of Law, and was, to the Honour of our Constitution, as unexampled as unreasonable. The House of Commons has, 'tis true, in former Times, been engaged in Disputes upon their Powers in Election-Matters with the other Branches of the Legislature, as in the Case of Sir Francis Goodwin, and that of Ashby and White: But it remained for the Policy of the present Times, and the Ingenuity of the present Ministers, to create a Dispute between the Collective and Representative Body, by setting the Privileges in Opposition to the Rights of the People.

I am not to learn, that where the People have a Right to substantial Justice, they will not be satisfied with the Quirks of Law, or the Sophistry of Order. However successfully these may formerly have been employed, from the Mouth of a Minister, to palliate the venal Vote to the callous Conscience of a bribed Senator, they will
never

never persuade a free and enlightened People, that the Rights which they have reserved, can be destroyed by the Privileges which they have granted. They will watch every Invasion of the Right of Election with a jealous Eye; Forms and Precedents will have little Weight with them, ~~if~~ they will investigate the Point upon general and constitutional Principles. These will convince them, that Laws, which are intended for the Security, can never operate to the Destruction, of their most valuable Rights. They will see that it is impossible a Freeholder, who is but one Degree removed from a Legislator, should lose his Rights by any Thing but the Act of the whole Legislature.

Reason, as well as SIDNEY, will tell them, That as the People's Delegates, or Representatives in Parliament, do not meet there by a Power derived from Kings, but from those that chuse them; so they who delegate Power do always retain to themselves more than they give; and, therefore, the
 People

People do not give their Delegates an absolute Power of doing what they please, but do always retain to themselves more than they confer on their Deputies, who must, therefore, be accountable to their Principals.

They will see, that the very Point upon which this Claim rests, the Power of the House of Commons, furnishes the strongest Argument against it. The greater and more important the Power to be delegated is, the more necessary is it that the Right of the People in Delegating that Power should be free and unrestrained. If there is an Assembly which is to have the absolute Disposal of the Lives, Liberties, and Fortunes of the Whole; surely it is but reasonable that every Part should have full Power to intrust the Care of their Interests in *that* Assembly to Those, and Those only, whom they think most likely to discharge that Trust with Integrity and Ability, subject to no subsequent Controul. This is absolutely necessary to form a free Representation for the Security of
of

of the Parts, and can by no means be attended with any Inconvenience to the Whole ; as the Representative so appointed is not vested with an independent negative Power, but is bound, as well as his Constituents, by the Determination of the Majority.—Such a People will guard with Temper and Firmness what they have watched with Vigilance ; they will be careful that Nothing unjustifiable in the Mode shall defeat the Ends, or disgrace the Motives of their Opposition.

The late Determination was certainly the *Act* of the House of Commons, because whatever is determined by a Majority of Members present, above forty, is deemed so by the Constitution of Parliament ; but many Circumstances lead me to doubt, whether it can really be thought the Opinion of the Representative Body of the People. It was carried thro' upon the last Day of a protracted Session, after it had been determined in a thin House, that there should not be a full one, by the (till then, I believe, unprecedented)

cedented) Refusal of a Call of the House, upon a Division of 94 to 49 : I cannot help therefore lamenting, in the Style of Col. Luttrell's Advertisement, " that 221 so circumstanced, not being the Majority of 558, should arrogate to themselves the Right of pronouncing the comprehensive Sense of the whole People of England."

An House of Commons *may* indeed act wrong, by conforming to the Prejudices of People ; and the Constitution has guarded against any Inconveniences attending so justifiable a Mistake, by the Negative which the other Branches of the Legislature have upon the Proceedings of that Assembly. But that House of Commons *must* act wrong, which acts in notorious Opposition to the Sentiments of the People who sent them. The contrary Notion, should it prevail, would be fatal to the Existence of the Democratical Part of our Constitution, by substituting in its Place a second independent aristocratical Branch, not like the first, founded in the Right of Hereditary Succession,

sion, or Royal Favour, but the Offspring of casual Wealth, and occasional Corruption. Such a Notion supposes an Unpopular Popular Assembly; a Representative Body not Representing.—It is in vain to attempt describing the Effects of this Doctrine; the Horror of the Idea is lost in the Absurdity of the Expression.

The present Situation of our Liberties is truly critical; they are, indeed, in imminent Danger, but not irretrievably lost: A firm, vigorous, and immediate Exertion of the still unquestioned Rights of the People, will restore the Constitution to its pristine Vigour. The voice of the Collective Body must, and ought to have the most effectual Weight with the Elected Body. Should the People in general express their Dissatisfaction at the late Proceedings; whether their Complaints should reach the Ears of their Representatives by the old Constitutional Method of Instructions, or by the means of Private Conversation during the Recess*, I do not

* It is the Law and Custom of Parliament, That when any new Device is moved on the King's Behalf

doubt that the present uncorrupt House of Commons will *remember their Creator in the days of their Youth* ; that they will know that it is their Duty to express, not controul, the Sentiments of the People.

Those who think their Conduct in Parliament should be swayed by Reason, will find sufficient Arguments to induce them to rescind the Resolution ; nor are Precedents wanting, (where the House of Commons have undone in Cases affecting the Rights of the People, in one Session, what they had done before) to guide those who prefer Example to Reason.

Should the People prefer the Exercise of that Right which the Nature of the Con-

in Parliament, for his Aid or the like, the Commons may answer, “ That they tender the King’s Estate, and are ready to aid the same ; only in this Device *they dare not agree*, without Conference with their Counties : whereby it appeareth, that such Conference is warrantable by the Law and Custom of Parliament.” *Lex Parliament.*

stitution has reserved to them *, of appealing to the Wisdom and Justice of the Supreme Power, by respectfully carrying their Complaints to the Foot of the Throne; it is not to be doubted that they would obtain the fullest Redress from Him, who is truly the Father of his People. In short, any vigorous Step warranted by the Constitution, cannot fail of rendering such Doctrines as, *That the People, by giving their Votes at an Election for one Man, have chosen another, and, That because the Law declares him to be duly elected who has the Majority of legal Votes, therefore the Person who has the Minority ought to sit,* rather ridiculous in the Eyes of Posterity from their Absurdity, than odious from their Consequences.

* “ Resolved, That the House do agree with the Committee in the said Resolution, so amended, That it is the UNDOUBTED RIGHT of the People of England to petition or address to the King for the Calling, Sitting, or DISSOLVING Parliaments; and for the REDRESSING OF GRIEVANCES.” *Journals of the Commons, Feb. 26, 1761.*

Nothing can be fatal to the Liberties of the People but their own Inactivity. Should they in this first Instance submit, without Complaint, to the Exercise of this new-claimed Power, such a Silence will imply their Consent, and this Resolution will become, by such *Consent* *, the Law of the Land.

The sacred Right of Free Election, founded in the very Principles of the Constitution, confirmed by the Wisdom of Ages and the Blood of Thousands, may by the Negligence of a Moment be lost for ever! It behoves them to remember, before it be too late, that excellent Observation of a former Parliament, in their Apology to one of our Kings, “ The “ Privileges of Subjects are, for the most

* It (the Custom) must have been peaceable, and acquiesced in; not subject to Contention and Dispute. For as Customs owe their Original to common Consent, their being immemorially disputed, either at Law or *otherwise*, is a Proof that such Consent is wanting. *Blackstone's Commentaries.*

“ Part,

“ Part, at an everlasting Stand. They
 “ may, by good Providence and Care, be
 “ preserved, but being once lost are not
 “ recovered but with much Disquiet.”

I shall make no Apology for having troubled you with so long a Letter upon so important and interesting an Occasion; which I flatter myself you will rather look upon as a Duty than an Intrusion. I think, with Doctor Blackstone, that “ Every
 “ Member’s Conduct is subject to the fu-
 “ ture Censure of his Constituents, and,
 “ therefore, should be openly submitted to
 “ their Inspection.” I should have been ashamed, upon any future Occasion, to solicit you for the Renewal of so important a Trust as the Care of your Liberties in Parliament, could there have been the smallest Doubt of their having suffered by my Negligence or Connivance. I have thought it my Duty, not only to give an Account of my own Conduct, but to state to you, at large, the Danger your Rights are exposed to, and to suggest to
 you

you the only constitutional Means of Redress still in your Power.

I will conclude by assuring you, that my Conduct in Parliament has been influenced by no Motive but a sincere Zeal for the Welfare of my Country ; and that I have constantly had in View that excellent Observation with which Doctor Blackstone concludes his Commentaries : “ The Protection of THE LIBERTY OF BRITAIN “ is a Duty which they (such Gentlemen “ of the Kingdom as are delegated by “ their Country to Parliament) owe to “ themselves, who enjoy it ; to their Ancestors, who transmitted it down ; and to “ their Posterity, who will claim at their “ Hands this, the best Birth-Right, and “ noblest Inheritance, of Mankind.”

I am,

S I R,

Yours, &c.

P O S T S C R I P T.

THOUGH I flatter myself you will find every Appearance of Argument on the Ministerial Side refuted in my Letter, yet, as a Performance has appeared, under the title of *The Case of the late Election for the County of Middlesex considered, on the Principles of the Constitution and the Authorities of Law*, which seems to be their grand Battery, and is said to be the Work of their chief Engineer; I could not let it pass without some Observations upon the most striking Parts. The Author sets out with declaring himself the Champion of a *prudent Administration*, which is not *inattentive to popular Clamour*. Whether the People will take this Gentleman's bare Assertion against the *consistent* Conduct of Administration, upon those two Points, Time must discover. He undertakes the arduous Task of making the People *renounce their Opinions* (which are, according to him, *founded on the misguided Impetuosity of public Prejudice*); and to *turn their Resentment against those who have deceived and misled them*. "To this End, he proposes to shew, from the Records of Parliament and the Authorities of Law, that the House of Commons is legally invested with the Power which they have exercised with Respect to the late Determination of the Election for Middlesex." Farther, that, on the general Principles of Reason and constitutional Policy, they ought to have such a Power: And that, in the Instance in Question, they have exercised their Power in a just and constitutional Manner; not only according to the Law and Usage of Parliaments, but in strict Conformity with the Adjudications in the Courts of Westminster on similar Occasions." It must be confessed, that he has not mistaken the Means; it remains to enquire whether he is possessed of the Materials.

The Author (page 6.) says, "The Law of Parliament may be considered as composed of two Branches; 1. The Rules, Orders, Customs, and Course of the House, with their Expositions of and Decisions upon the Law, with Respect to Matters within their Jurisdiction. The Customs, Course, and common judicial Proceedings of a Court are the Law of the Court, of which the common Law takes Notice, without alledging or pleading any Usage or Prescription to warrant
N "them."

P O S T S C R I P T.

“ them.” The Author will not, I suppose, deny, that the Person having the Majority of legal Votes is, *by the Custom of Parliament*, duly elected. He contends, however, that, *by the Custom of Parliament*, the Person who *has not* the Majority of legal Votes ought to sit. I should be glad to know how he will reconcile this Doctrine to that formerly laid down by his *Illustrious* Dr. Blackstone. “ Customs must be consistent with each other: One Custom cannot be set up in Opposition to another; for if both are really Customs, then both are of equal Antiquity, and both established by mutual Consent; which to say of contradictory Customs is absurd.”

The Author then proceeds to prove, what nobody doubts or has disputed, “ That the House of Commons have the sole and exclusive Power of punishing their own Members, *as such*; either by Commitment, Suspension, Expulsion, or otherwise.” What this Gentleman means by this Expression, it is too vague for me to determine; nor do I know of any other Powers than those he specifies, except Reprimand. To prove this, he refers the Reader to a pompous Note, full of Precedents, with proper Italics, to mark the Application of the Case of Mr. Steele, the Champion of the Hanover Succession, to that of Mr. Wilkes.

In page 9. we are told, “ The necessary Consequence of Expulsion is, that the Person expelled shall be incapable of being elected again to serve in the same House of Commons that expelled him. This Incapacity is implied in the very Meaning of the Word itself. Should any Man of plain Sense, nay, should any young Academician, or School-Boy, even be asked what is understood by expelling a Man from any Society, they would certainly answer, The Meaning is, that he shall never be a Member of *that* Club, or of *that* College, or of *that* School, any more.” I will not dispute with the Author upon the Nature of Club-Expulsions, as I am sensible he has an Opportunity of knowing their Extent from the best Authority *. He has, however, forgot one material Circumstance attending the Cases which he has quoted, which is, that *the Persons* who expel are *those* who have the Power of electing; and *any young Academician* (*Chancellor of a University*), or *even School-Boy*, will tell him, that they do not deprive themselves of their Right to receive again the Scholar, though it is not probable they will exercise it. In the next paragraph we are told, “ Expulsion clearly, *ex Vi Terminii*, signifies a total, and not a partial Exclusion from the Society or Parliament from whence he is removed. If a Member is excluded during Pleasure, or for a certain Time only, that is, properly speaking, a SUSPENSION, and not an EXPULSION.” The Fallacy of this Argument might be detected by the Author’s School-Boy, who would certainly tell him, that a Member *suspended* never

* Vide the Jockey-Club Proceedings in Brereton’s Case, signed by the Duke of Grafton,

P O S T S C R I P T.

ceases to be a Member, and is entitled to his Seat again without a Re-election; and that a Member *expelled* does cease to be a Member, and is not entitled to any Seat without a fresh Election.

The Author tells us, "To admit the Right of expelling; and argue that the Member expelled may be re-elected that Parliament, is to contend for the greatest Absurdity imaginable: It would expose the House of Commons to the most flagrant Insult and Contempt; it would render the Determination of the House of Commons totally nugatory, if the Member whom they expelled To-day should be forced upon them again Tomorrow." The Crown has the same Power to dissolve (or, if I may be allowed the Expression, to expel) the whole House, that the House has to expel one Member: a Power lodged in the Crown, not to be wantonly exercised, but for the wisest Purposes, from a Presumption of Law, that the King, who can do no wrong, will only exert it to prevent "unfit and unworthy Representatives sitting in Parliament, to the Disgrace and Detriment of the Nation. Will this Gentleman say, that the Crown is exposed "to the most flagrant Insults and Contempt," and its Power "rendered totally nugatory," because the Parliament it has dissolved "To-day may be forced upon it again To-morrow?" The Fact is, these Powers are exactly similar, equally necessary, and granted for the same Purposes. An imprudent Surrender of one of these Powers to the Long Parliament cost the King his Head, and occasioned the Subversion of the Constitution; an unwarrantable Stretch of the other may force the People to call upon the Crown for the Exertion of that Prerogative, which can alone deprive those of the Power who have forfeited the Esteem and Confidence of the People. The House of Commons may expel; the King may dissolve; but in both Cases it is the People alone that must choose their Representative, whilst the Constitution remains upon its original Foundation.

Page 11 the Author puts an extraordinary Question: "Shall *they* be at Liberty to restore him, who had no Power to expel him?" This Question is just as applicable to the Case of a whole Parliament upon a Dissolution, as to that of a single Member upon an Expulsion, the People having as little Power to dissolve as to expel. Let me ask him, however, what he thinks of his own Question nearly inverted: Shall *they* be at Liberty to exclude him who have no Power to elect him? "*Certainly not.*"

He next supposes, for the Sake of Argument, that the People met in their Collective, and not Representative Body; and asks if they would not have a Right to exclude any one Person from that Society? Undoubtedly they would; and by such Exclusion the original Compact would be dissolved as to that Person; who being deprived of the Benefits, would be discharged from the Burthens of the Society. If, therefore, this could prove

P O S T S C R I P T.

any thing in the present Case, it would prove that the Freeholders of Middlesex being, in the Person of their Representative, excluded from the House of Commons, are not bound by its Authority. It must be confessed that this Author is as unfortunate when he attempts to reason, as I shall prove him to be when he *pretends* to quote. In the next Page we find the most barefaced Attempt to impose a false Quotation upon the Public, in the Case of Mr Walpole, by omitting the Words “ committed “ a Prisoner to the Tower of London,” and “ for a high Breach “ of Trust in the Execution of his Office, and notorious Corruption when Secretary at War.” I call it a barefaced Attempt to impose upon the Public, because it is plain that this Gentleman, by pompously putting *Robbed* in Capitals at the Head of it, and marking the whole as a Quotation, without any Break to shew the Omissions, meant that it should pass for a fair and full Extract from the Journals. I only mention this as a Specimen of ministerial Candour *without Deceit*. In Fact, either Way it would not be material to the main Point; though the true State of the Question would have been fatal to this Writer’s Argument, who had Sense to discern, though not Ingenuity to confess, that the House meant to declare that Incapacity was the Effect of Breach of official Trust and notorious Corruption, and as such the Concomitant, and not the Consequence of Expulsion.

Having seen how the Author proceeds when he wants to wrest an inapplicable Precedent to his Purpose, we shall next see his Manner of getting rid of one that is directly against him. He undertakes to prove, that Incapacity has been the constant Effect of Expulsion; but in his Way, he unfortunately stumbles upon the Case of Mr. Woolaston; in which the House used the word Expelled (*probatum in omnibus** indeed, if you will believe him) to express a *temporary Amotion*. If the Precedents of Parliament are to be the Law of the Land, this Writer must excuse us if we take them as they are to be found upon the Journals, without any Regard to either the Corrections or Spoliations of an anonymous Commentator. Indeed, it will be only necessary to refer him to the preceding Page of his own Pamphlet to convince him, that “ Nothing can “ be more absurd than to urge an Opinion from *Implication* only, “ contrary to that which is declared in *express* Words.” However, for the Sake of Argument, we will for a Moment admit

* This *Incapacity* was, however, by no Means confined either to this Case, or that Parliament. We find another House of Commons, Feb. 10, 1702, resolving, That Sir Henry Furse, having since his being elected a Member of that Parliament accepted a Place, and acknowledged a Breach of the 1st of the 6th and 8th of Will. and Mr. (the name that Mr. Woolaston’s Offence came under) And it was further resolved, That the said Sir Henry Furse be, for the Breach of the said Act, expelled from the House. By which it appears, that in two Parliaments, at least, it is a *temporary Amotion*, and not *Incapacity*.

P O S T S C R I P T.

that the Expression was *somewhat inaccurate*. This very *Inaccuracy* is all that is **contended** for on our Part. The Author undertakes to prove, that "Expulsion, *ex Vi Termin*, signifies a total, and "not a partial Exclusion;" and, in the Course of his Proof, he is obliged to assert, that the House of Commons, in the Year 1698 (no very ignorant Time), were not accurate in confining the Word to that Signification. Will he persist in contending, that so important a Right as that of Election is to be regulated by a Law, subject to so gross an *Inaccuracy* as to *express* the very Reverse of what it *means*?

The Author spends eighteen Pages in proving, that "They "have the sole and exclusive Power of examining and determining the Rights and Qualifications of Electors and Elected, "together with the Returns of Writs, and all Matters incidental to Elections." This Nobody disputes. I cannot, however, agree with him, that "It is by their Resolutions, "only, that Persons of various Classes are at this Day disqualified." To prove the contrary, it is sufficient to remark, that those Resolutions were all judgments upon Cases before them, according to what *was* the Law before, and not Declarations of what should *become* the Law. The House of Commons, in those Days, would have been struck with the Injustice of an *ex post facto* Law. There is a Proof (in the Case of Sir Andrew Nowell, Sheriff of Rutland, in D'Ewes's Journal) that the House thought themselves obliged to conform to the Rules of the Common Law, in Preference to their own Precedents where they were contradictory: Sir Edward Hobby said, The House might well receive Sir Andrew Nowell; and he vouched a Precedent of the 31st of the Queen, when a Writ was directed to the Bailiffs of Southwark to return Burgesses, and they returned themselves, and were received. It was urged on the other side, That, by the Common Law, no Man can make an Indenture to himself. Sir Andrew Nowell was not received.

The Author says Page 323, That, upon Mr. Wilkes's being returned after his Expulsion, the House resolved, "That he *was* "and *is* incapable of being elected to serve in this present Parliament." Therefore, admitting that his Incapacity was not a *necessary Consequence* of his Expulsion, which the Freeholders were bound to take Notice of, yet "this *express* Declaration "of Incapacity was such as all the Freeholders of Great Britain "were bound to take Notice of." What would this Gentleman think of a Court of Justice, which, having transported a Man for seven Years for a Felony, should upon his Return think that he ought to have been hanged, and *therefore* condemn him to be hanged for the *same* Crime?

The Author then cites some Corporation Cases, in which Persons having the Majority of Votes were set aside by the Courts below, upon Disqualifications proceeding from the fundamental Constitutions of those Corporations, to justify *such* a Proceeding by the House of Commons, contrary to the fundamental

P O S T S C R I P T.

mental Constitution of Parliament and express Statutes; and this he calls a happy Instance of the perfect Agreement and Correspondence between the Adjudications of the Courts of Westminster, and the Determinations of the House of Commons.

The Author having set out with saying, "Removed, as the
" far greater Part are, from the Source of true Intelligence,
" how easy is it for those who have an Interest in imposing on
" the Public, to mislead them by false Representations?" is determined to try how far he can impose upon them by a second flagrant Misrepresentation of the Proceedings of the House. He says (Page 37.) "Nay, indeed, it has been admitted on the
" other Side, that they (the Votes) were thrown away; for on
" the Question, Whether the foregoing Elections of Mr. Wilkes
" were null and void? they were without a Division deter-
" mined to be null and void." This did not proceed, as this Writer pretends, from a general Admission that the Votes were null and void, but from the necessary Observation of that Rule of Proceeding by which the House of Commons is precluded from rescinding a Resolution it has come to in the same Session.

In Page 38. we find the Author endeavouring to get rid of that Part of Mr. Walpole's Case which makes directly against him; Mr. Taylor's not being received when Mr. Walpole's Election was declared void. For this Purpose, he says, "Inasmuch as it was the first and only Instance in which
" the Electors of any County or Borough had returned a Per-
" son expelled to serve in the same Parliament, and the Electors
" might be presumed not to have due Notice of the Effect of
" Expulsion, the House gave them an Opportunity to cor-
" rect their Error." He allows, that "It may be said, in-
" deed, that by their voting for a Person ineligible, a Right
" attached, by Operation of Law, in Mr. Taylor." It is not at all surprising, that it should cost an Author nothing to dispose of Mr. Taylor's Right by a Vote of Parliament, who writes with a professed Intention to prove that the legal Rights of all the Electors may be disposed of by a Vote of the House of Commons. Had this Gentleman fully quoted Mr. Walpole's Case, as I have done, it would have appeared that the House of Commons refused to admit Mr. Taylor, from a Conviction that they had no Right to do it, and not from a Presumption that the Electors were ignorant of such a Right (had it existed); since Mr. Taylor's Friends actually did assert it in their Petition*; though the House refused to countenance the Claim by hearing the Petition. Let us stop for a Moment here, and see what the History of this Law of Expulsion and Incapacity is, as it is given us by the Author himself. Seventy Years ago, the House (in the Case of Mr. Woolaston), from not *knowing* the Effect of the *known* Law of Parliament, used an Expression

* Vide Mr. Walpole's Case, *supra*, Page 23.

which meant the very Reverse of what they intended. About sixty Years ago, the House of Commons, from a Presumption that the Electors were ignorant of the *known* Law (notwithstanding “ * There cannot be a stronger Instance that, in the “ general Sense of Mankind, such Incapacity is the necessary “ Effect of Expulsion, than that of there having never been “ any Attempt made to re-elect one in the same Parliament, “ out of the very many that have been expelled, except in “ the single Instance of Mr. Walpole,”) thought proper to *exercise a Power of dispensing with that Law, which is the Birth-right and Inheritance of every Englishman*, to the Prejudice of Mr. Taylor and those Electors who had not thrown away their Votes, though they actually claimed the Benefit of it.

The Author apprehends great Danger to the Constitution, if, “ by arbitrarily keeping Seats vacant, the House may be “ purged, as in Oliver’s Time, to any Degree a Minister thinks “ proper;” but he thinks this Danger may be prevented by *arbitrarily filling them up with whoever a Minister thinks proper*. He tells us (Page 42.) “ All that is contended is, that “ they (the Electors) have exercised their *Rights* INEFFECTU- “ ALLY.” Here we are likely to agree for once; for all that is complained of is, that the Electors having *exercised* their *Right*, it was not suffered to *have its Effect*. He, however, comforts them, by *graciously* assuring them, that “ *No one means “ to take away their Franchise;*” and that “ They have still the “ Right of voting, on any future Occasion, for whom they “ please, being *ably qualified;*” (*that is, not disagreeable to the Ministry*). “ To remove the Apprehensions (if serious) of those “ who say, at this Rate the House of Commons may declare “ that no Freeholder under ten Pounds a Year shall vote at an “ Election for a Knight of the Shire, he assures them, that the “ Statute of Hen. VI. having fixed the Qualifications of the “ Freeholders at 40 s. *per Ann.* it is not in the Power of the “ House of Commons, nor of any Judicature whatsoever, to “ alter it: The Legislature only can enlarge or diminish the “ Qualification,” I add, either of the *Electors* or *Elected;* and should be glad to know what greater Security a Freeholder of 40 s. has that he shall be admitted to chuse, than a Gentleman of 600 l. a Year that he shall be allowed to be chosen: The Rights are equally secured by Law: The Power which can annihilate the one, can violate the other. Suppose some ministerial Dependant (perhaps this very Author) should stand up in the House, and tell them, “ That there is indeed “ *an obso-* “ *lete Statute*” of Hen. VI. that fixes the Qualification of Elec- “ tors at 40 s. *per Ann.* but that when that Statute was made “ 40 s. were equal to 20 l. now; that they have a recent Proof “ in the Behaviour of the County of Middlesex, how improper “ it is to allow the *Scum of the Earth* a Share in the Choice of

P O S T S C R I P T.

“Members to sit in that august Assembly.” Suppose this Reasoning backed by the Ministry, and adopted by the House of Commons, who, in Consequence of it, declare by a Resolution, that no Freeholder shall vote who has not ten or twenty Pounds *per Ann.* How is this Vote to be prevented from taking Effect? Have they not “the sole and exclusive Power of examining and determining the Rights and Qualifications of Electors and Elected, together with the Return of Writs, and *all Matters incidental to Elections?*” Are not their Judgments “the most binding because they are without Appeal?” and are they not “*the proper and sole Judicature, entrusted with the Exposition of the Law in such Cases?*”

The Author in the same Page (43) in his great Eagerness to accuse and blacken the Opposition, makes two very unguarded Confessions, which his Friends in Administration will not be obliged to him for: The one is, “That they have not employed the proper Attention to Improvements for the public Good.” This the People have long seen, and long complained of. The other Confession, which makes *their Justification* from this Crime, and the Accusation against the Opposition, is, “That they bestowed *that* Attention upon the Management of this Election.” It has long been felt and complained of in this Constitution, that Ministers did interfere in and influence Elections; but never till now had any Minister or his Dependents the Effrontery to avow it, or the Folly to plead it as an Excuse for their Neglect of Duty. It becomes the People to look about them: When Ministers disdain to save Appearances, it is not to be expected they will forbear to invade real Rights. Even Hypocrisy has its Limit, when it serves to restrain more daring Vices.

I shall conclude this with an Observation of this Author’s upon the Proceedings of the House of Lords, the Application of which, *to those of another Assembly*, I shall leave to you: “An insatiable Appetite for Power is natural to all Bodies of Men; and if the Judgment of that august Assembly may be presumed to have less Authority in one Case than another, it must certainly have less Weight in this, wherein their Judgment directly tended to enlarge their own Jurisdiction, and ultimately to give them a manifest Ascendancy over the third Estate of the Kingdom, and consequently over the Liberties of the People of Great-Britain.”

F I N I S.

UC SOUTHERN REGIONAL LIBRARY FACILITY



AA 000 150 641 9

University of California
SOUTHERN REGIONAL LIBRARY FACILITY
405 Hilgard Avenue, Los Angeles, CA 90024-1388
Return this material to the library
from which it was borrowed.

2000-07-31

JUL 31 2000

DUE 2 WKS FROM DATE RECEIVED

ILL-UBV

RECD APR 22 2001

Gaylord

Univer
Sout
Lib